RETREAT FROM A MURDEROUS ASSAULT.

"A TRUE man, who is without fault, is not obliged to fly from an assailant who by violence or surprise maliciously seeks to take his life, or to do him enormous bodily harm." These words of the Supreme Court of Ohio were quoted with approval and followed by the Supreme Court of the United States in 1895.[1] Two years later the same court sustained a charge to the effect that "if he is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm . . . he may lawfully kill the assailant . . . provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling him without killing him, if it be in his power."[2] These contradictory views, thus held by the same court at substantially the same time, have pretty evenly divided the jurisdictions in this country. One view must be right; both cannot be. But to choose with confidence the right theory requires a somewhat careful examination of the history of the law of self-defense.

I.

It is almost an axiom of our law that a man who kills another in the necessary defense of himself from death or even from serious bodily harm is excused, and must be acquitted when indicted.[3] So reasonable is this doctrine, that a modern lawyer can hardly believe that homicide in self-defense was once a capital offense; and a modern judge is greatly tempted to misread the old authorities in the light of modern notions of justice, and to misapply old precedents to the damage of contemporary administration of law. Yet the right to kill in self-defense was slowly established, and is a doctrine of modern rather than of medieval law.

From the beginning of the jurisdiction of the king's courts over crime to the reign of Edward I. homicide could be justified only

[1] Beard *v.* U. S., 158 U. S. 550.

[2] Allen *v.* U. S., 164 U. S. 492.

[3] Fost. C. L. 273; R. *v.* Bull, 9 C. & P. 22; S. *v.* Burke, 30 Ia. 331; C. *v.* Mann, 116 Mass. 58; S. *v.* Brooks, 99 Mo. 137, 12 S. W. Rep. 633; Shorter *v.* P., 2 N. Y. 193; Young *v.* S., 11 Humph. (Tenn.) 200.

when done in execution of the king's writ, or by authority of a custom by which a thief hand-having and back-bearing, an outlaw, or perhaps other manifest felons, might be taken by force without a warrant; [1] in short, in cases where the homicide was committed in execution of the law. In all other cases, whether of misadventure or of necessary self-defense, the defendant could set up no justification but must be convicted; to use the words of Pollock and Maitland, he deserved but needed a pardon.[2] Thus in the Shropshire eyre of 5th John, "Robert of Herthale, arrested for having in self-defense slain Roger, Swein's son, who had slain five men in a fit of madness, is committed to the sheriff that he may be in custody as before, for the king must be consulted about this matter." [3] The king "*de gracia sua et non per judicium*" issued a pardon in such cases.[4] On the other hand where one in pursuit of a robber escaping from arrest beheaded him as he ran, the act was justifiable; [5] and one who in resisting a robber killed him was acquitted; [6] but a woman who killed to defend herself from rape was not acquitted.[7] The line between homicide in execution of the law and homicide by misadventure or *se defendendo* was not yet clearly defined; but the distinction was well established.

It had become the practice of the Clerks in Chancery to issue a writ (similar to the writ *de odio et atia*) to inquire whether a homicide for which a man was under arrest had been committed "by misfortune, or in his own defence, or in any other manner without felony"; but by the Statute of Gloucester [8] this was forbidden, and it was provided that a verdict should be found before the justices in eyre or gaol-delivery, and then "by the report of the justices to the king the king shall take him to his grace, if it please him." [9]

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[1] 2 P. & M. Hist. 476.

[2] 2 P. & M. Hist. 477; and see the extract from an old Precedent Book there quoted: "By way of judgment we say that what you did was done in self-defense; but we cannot deliver you from your imprisonment without the special command of our lord the king."

[3] 1 Seld. Soc. 31.

[4] B. N. B. pl. 1216.

[5] 4 Staff. Coll. 214; see also B. N. B. pl. 1084.

[6] Mait. Pl. Glouc. 94 (translated, Kenny, Cas. Cr. L. 139).

[7] Page, North. Ass. Rolls 85. See a strong case the other way in the same eyre, *ibid.* 94.

[8] 6 Ed. I. c. 9.

[9] This does not indicate a more liberal treatment of such cases, as Coke (3d Inst. 55, following the suggestion in 21 Ed. III. 17, pl. 23) supposes, but the contrary.

The law as it was in the time of Edward I. remained long unchanged. One protecting himself from robbery or executing the law might kill and be justified.[1]

"Where a man justifies the death of another, as by warrant to arrest him, and he will not obey him, or that he comes to his house to commit burglary and the like, if the matter be so found the justices let him go quit without the king's pardon; it is otherwise where a man kills another by misfortune, &c."[2]

In Compton's Case[3] Thorpe, C. J., said:

"When a man kills another by his warrant he may well avow the fact, and we will freely acquit him without waiting for the King's pardon by his charter in the case. And in many other cases a man may kill another without impeachment, as if thieves come to rob a man, or to commit burglary in his house, he may safely kill them, if he cannot take them. And note how it was with a gaoler who came to the gaol with a hatchet in his hand, and just then the prisoners had broken their irons, and were all ready to have killed him, and they wounded him sorely, but with the hatchet in his hand he killed two, and then escaped, &c. And it was adjudged in this case by all the council that he would not have done well otherwise, &c. Likewise he said that every person might take thieves in the act of larceny, and felons in the act of felony, and if they would not surrender peaceably, but stood on their defence, or fled, in such case he might kill them without blame, &c."

But if one killed another by misfortune or in necessary self-defense his chattels were forfeited, and he must get the king's pardon.[4]

"It was presented that a man killed another in his own house *se defendendo*. It was asked whether the deceased came to have robbed him; for in such case a man may kill another though it be not in self defense. *Quod nota*. And the twelve said not. Wherefore they were charged to tell the way how &c. it happened, whereby he should obtain the king's pardon."[5]

And if the killing were unnecessary not only could there be no acquittal, but there would not even be a pardon.

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[1] F. Coron. 330 (3 Ed. III.); 26 Lib. Ass. pl. 23 (translated, Kenny, Cas. Cr. L. 137); 26 Lib. Ass. pl. 32.

[2] F. Coron. 261 (T. 22 Ed. III.).

[3] 22 Lib. Ass. 97, pl. 55 (translated, Beale, Cas. Cr. L. 316).

[4] 21 Ed. III. 17, pl. 23; 44 Ed. III. 44, pl. 55 (*semble*); 2 H. IV. 18, pl. 6; F. Coron. 284, 287.

[5] F. Coron. 305 (3 Ed. III.).

"Note that at the delivery of Newgate, before Knyvet [C. J.] and Lodelow [C. B.] it was found that a chaplain *se defendendo* slew a man, and the justices asked how. And [the jurors] said that the man who was killed pursued the chaplain with a stick and struck him, and he struck back, and so death was caused. And they said that the slayer, had he so willed, might have fled from his assailant. And therefore the justices adjudged him a felon, and said that he was bound to flee as far as he could with safety of life. And the chaplain was adjudged to the Ordinary." [1]

The pardon in cases of self-defense was a matter of course; the speaking to the king was naturally a mere form; the Chancellor signed the pardon in the king's name. But it was needless to keep up a form based upon a rule of law obviously opposed to equity. The Chancellor as the dispenser of equity soon dispossessed the Chancellor as the mere keeper of the great seal. As early as the beginning of the reign of Edward III. he relieved against judgments of conviction in such cases.

"Note that when a man is acquitted before the justices errant for death of a man *soy defendendo*, the process is such, that he shall have the writ of the Chief Justice, within which writ shall be contained all the record of his acquittal, to the Chancellor; who shall make him his writ of pardon without speaking to the King by course of law. Such a man is bailable after the acquittal, &c." [2]

"Scrope [C. J.] and Louther, Justices, ordered the prisoner to remove the record into the Chancery; and the Chancellor made him a charter in such case without speaking to the king." [3]

In 4 Henry VII. the report reads:

"In the Chancery it was moved that one was indicted because he killed a man *seipsum defendendo*, &c. And the Chancellor said that the indictment should be removed into the King's Bench, and that he would grant a pardon of common grace unto the party according to their form. And it was suggested by the Sergeants at the bar that there was no need of having any pardon in this case; for here the Justices would not arraign him, but dismiss him, &c.; but if the indictment were for felony, and the party put himself upon the inquest for good and ill according to the Statute of Gloucester, c. 9, then if the inquest found that he did it *se defendendo* the Justices would adjudge him to prison until he had a pardon; but here he should be dismissed, and not lose his goods.

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[1] 43 Ass. pl. 31: translated Kenny, Cas. Cr. L. 141.
[2] F. Coron. 361 (3 Ed. III.).
[3] F. Coron. 297 (3 Ed. III.).

"FAIRFAX [Justice of the King's Bench], who was in the Chancery, went to his companions, and returned and said, that their custom was to take inquest and inquire whether he did it *se defendendo* or not, and if so found he lost his goods, &c.; and so in either way he should have a pardon by his opinion. And so it seemed to the Chancellor that a charter should be granted.

"Note the opinion of the Justices of the Bench against the Sergeants."[1]

Though in a difference between the bench and the bar the bench triumphs for a time, the opinion of the bar, if tenaciously held, will in the end prevail. In 1534 the jury found that the accused killed his victim in his own defense. "Wherefore he should have his charter of pardon. And Port, J. adjudged that he should go *adieu*. *Quod nota*."[2] This was perhaps the first case of self-defense after the statute 24 Henry VIII. c. 5.[3] This statute indicated the feeling of the time against a formal conviction in such cases; and though in terms it referred only to forfeiture, it was taken as providing for acquittal without formal pardon.[4] It was, moreover, liberally interpreted to cover similar cases.

Thus the equitable defense, partly as the result of a statute and partly by the liberality of the courts of common law, became a legal defense. When the necessity ceased for a formal pardon in cases clearly not within the statute one cannot say. The pardon was so purely a matter of form that Coke does not mention it;[5] and though Lord Hale speaks of it incidentally,[6] in his time it would seem that one who killed in necessary self-defense was ac-

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[1] 4 H. VII. 2, pl. 3: So B. Chart. de Pardone 65, "Home avera chartere de perdon de course hors del Chancerie pur mort de home se defendendo, 4 H. VII. 2."

[2] 26 H. VIII. 5, pl. 21.

[3] "Forasmuch as it hath been in question and ambiguity, that if any evil disposed person or persons do attempt feloniously to rob or murder any person or persons in or nigh any common highway . . . or in their mansions . . . should happen in his or their being in such their felonious intent to be slain by him or them whom the said evil-doers should so attempt to rob or murder; . . . the said person . . . should for the death of the said evil disposed person forfeit or lose his goods and chattels for the same, as any other person should do that by chance-medley should happen to kill or slay any other person in his or their defence; . . . be it enacted . . . That if any person . . . be indicted or appealed of or for the death of any such evil disposed person . . . [he] shall not forfeit or lose any lands, tenements, goods, or chattels . . . but shall be thereof and for the same fully acquitted and discharged, in like manner as the same person or persons should be if he or they were lawfully acquitted of the death. . . ."

[4] Cooper's Case, Cro. Car. 544.

[5] 3d Inst. 55.

[6] 1 P. C. 489.

quitted, since the felony alleged in the indictment was disproved.[1] Before the time of Foster the old law had been forgotten, and acquittal was a matter of course.[2]

It will thus appear that the history of the law of self-defense to the middle of the eighteenth century had been as follows. Self-defense merely was no excuse, but ground for pardon; but it was an excuse in equity, and the equitable defense was at last accepted at law.[3] Killing in due execution of law was justifiable. This meant at first killing under warrant or by custom; later private persons were permitted to execute the law upon felons in a few cases. These cases were almost without exception attacks by robbers: attempted murder or rape could not thus be justifiably prevented by a private person.

There seems no sufficient reason for distinguishing between killing a robber and killing a felon who is attempting murder or rape;[4] but the law is explicit. It is thus summed up by Coke.[5]

"If a thief offer to rob or murder B either abroad or in his own house, and thereupon assault him, and B defend himself without any giving back, and in his defence killeth the thief, this is no felony; for a man shall never give way to a thief, &c., neither shall he forfeit anything. . . . So if any officer or minister of justice that hath lawful warrant," &c.

The expression "if a thief offer to rob or murder B," as shown both by the context and by the authorities cited, means if a thief come and demand B's money or his life, *i. e.* threatens homicide only as an alternative to robbery, and the force used in defense is used solely to prevent the consummation of the robbery. Even fatal force may be used for this purpose, "for a man shall never give way to a thief." Coke did not mean to suggest that one could kill a thief who threatened murder but not robbery; nor did Stanford,[6] nor Hale,[7] nor Hawkins.[8] A different turn was given the words by Foster.

Killing for which justification was allowed must be necessary;

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[1] 2 Hale P. C. 258.

[2] Fost. P. C. 273.

[3] The old French law took the same course; see Pandectes Françaises, Rec. vol. 37, p. 574.

[4] 1 Hawk. P. C. 172.

[5] 3d Inst. 5b.

[6] Stanf. P. C. 14*b*.

[7] 1 Hale P. C. 481.

[8] 1 Hawk. P. C. 172.

that is, it was permitted only when to refrain from killing the malefactor would necessarily leave him free to commit his crime and escape.[1]

II.

Thus stood the law at the time Sir Michael Foster published his essay on Homicide.[2] He complains of "darkness and confusion upon this part of the law"; "the writers on the Crown-law . . . have not treated the subject of self-defence with due precision."[3] He distinguishes between justifiable and merely excusable self-defense, the latter at common law requiring a pardon and causing forfeiture. The rules which he laid down are still commonly repeated.

"In case of justifiable self-defence the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoreth by violence or surprize to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable."[4] "Where a known felony is attempted against the person, be it to rob or murder, here the party assaulted may repel force by force; . . . and if death ensueth, the party so interposing will be justified. In this case nature and social duty cooperate."[5]

Here we see two errors contributing to bring about an erroneous statement of law. The first is a misunderstanding of Coke's and Hale's phrase (here cited from Hale), "to rob or murder." Foster understands the passage in Hale to mean, if a thief comes to rob a man, or if he comes to murder him, the assailed may justifiably kill; and he generalizes that if any felony is attempted the killing in defense will be justifiable, not excusable. The other error is a result of the philosophy of the time. The right of self-defense, he argues, is founded in the law of nature, and cannot be superseded by a law of society. In cases of necessity the law of society fails; and the victim is remitted to his natural rights. The fallacy of such an argument in a legal treatise is more apparent now than at the time Sir Michael Foster wrote.

This distinction between justifiable and merely excusable homi-

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[1] Coke 3d Inst. 55; 1 Hale P. C. 479; 1 Hawk. P. C. 168. "Inevitable necessitie." Stanf. P. C. 13*b*.

[2] First ed., 1762.

[3] Crown Law, 273.

[4] *Ibid.*, 273.

[5] *Ibid.*, 274.

cides, opposed as it was to every preceding authority, has been very generally accepted without examination.[1] It was repeated almost word for word by East [2] and Russell.[3] Owing to the absence of modern cases, the question has become a purely academic one in England.[4]

The distinction between justifiable and excusable homicide before this time was a distinction between a killing for which one would be acquitted and one for which one must be convicted and pardoned. Foster for the first time uses it as the test of a case where one whose life is in danger must retreat before killing. To pass upon the correctness of this theory, it is necessary to examine the history of the law in this matter.

As has already been seen, before one could kill justifiably absolute necessity must be shown. If the killing were in the effort to effect an arrest, the necessity could not properly be avoided by retiring or permitting the escape, since that would be a dereliction of duty; and if the killing were to prevent robbery it could not properly be avoided by leaving the robber in possession of the booty, since the object of the law in giving the justification would not then be attained.[5] But if one murderously assailed could escape the attack by retreating, he must retreat rather than kill.[6] "For though in cases of hostility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honour, because the king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another." [7]

In one case a person attacked might properly defend himself against attack without retreating, that is, where he was attacked in his dwelling-house. He might defend his castle against felonious

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[1] An admirably correct statement of the true distinction will be found in Pond *v.* P., 8 Mich. 150, 177, *per* CAMPBELL, J.

[2] 1 P. C. 271.

[3] 3 Russ. Cr. (6th ed.) 213.

[4] Steph. Dig. Cr. L. 160 *n.* Stephen emphasizes the duty of retreat if possible.

[5] Coke, 3d Inst. 56.

[6] F. Coron. 297 (3 Ed. III.); 43 Ass. pl. 31. "A faire deffinition de homicide *se defendendo;* doyomus dire que il est properment quant A. fait affray sur B. et luy ferist, et B. s'enfua tant come il peut pur salvation de sa vie, issint que il est venus a un streit, ouster que il ne peut fuer, et A. continua l'assant, per que B. luy ferist et occida, ceo est homicide *se defendendo.*" Stanf. P. C. 15.

[7] 1 Hale P. C. 481. *Acc.* Daver's Case, Godb. 288 (*semble*); Calfielde's Case, 1 Ro. 189.

attack without retreating from it, since that would be to give up the protection of a "castle," which the law allows him.[1]

The line between legal resistance and duty to avoid by retreat the necessity of killing does therefore coincide with the line between justifiable and unjustifiable homicides in the old law, that is, between cases of execution of the law and cases of private defense; but by no means with the line drawn by Foster between justifiable and excusable homicide.

There is, however, another principle, entirely different in origin, which requires one under some circumstances to retreat before killing; and this applies only in cases which come under Foster's category of excusable self-defense. In case of mutual combat neither party may kill during the combat and be either justified or pardoned; for either by bringing on the combat or at least by consenting to it and voluntarily taking part in it he has become responsible for the necessity and is guilty of the death both at law and in equity. He can protect himself only by clearing himself from this responsibility. This he can do by withdrawing from the combat in such a way that anything which happens subsequently is chargeable not to him, but entirely to the other party, who wrongly continues or renews the attack. This is expressed by the rule that in case of chance-medley one must "flee to the wall" before he can excusably kill.[2] One who assails another intending to kill him cannot excusably kill even if he retreats to a wall; he must not merely try to escape, but he must actually escape from the conflict and put an end to it, or he will be guilty if he kills.[3] It will be noticed that the retreat in this case is not for the purpose of avoiding *unnecessary* killing; even a necessary killing in such a case, as where the conflict is so hot that neither party can withdraw, will not be excused. Its only purpose is to put an end to the conflict, or at least to free the killer from further responsibility for it. "Otherwise," said Sir Matthew Hale, "we should have all cases of murder or manslaughter, by way of interpretation, turned into *se defendendo*."[4]

Foster seems not to have distinguished between the retreat to avoid the necessity to kill, and the retreat to avoid responsibility for the combat; and in view of the fact that one sort is required in all cases where there is no true justification, and the other sort is

[1] 26 Lib. Ass. pl. 23; 21 H. VII. 39, pl. 50; R. *v.* Ford, J. Kel. 51; 1 Hale P. C. 486.
[2] F. Coron. 284, 286; 1 Hale P. C. 479, 482.
[3] 1 Hale P. C. 479.
[4] *Ibid.* 482.

not required where the slayer is not in fault, his erroneous distinction between justifiable and excusable homicide appears the more specious, and his rule that retreat was not necessary in justifiable felonies follows naturally.

III.

Since Foster's time the law of England upon the duty of retreat has not been brought into the courts; Stephen[1] speaks of the law contained in the authorities as "a curious relic of a time when police was lax and brawls frequent." In this country, however, the matter has frequently been considered, and in several jurisdictions it has been held that one who, being without fault, is murderously assailed may stand his ground and justifiably kill his assailant.[2] On the other hand, in several jurisdictions it is held that if the necessity of killing may be safely avoided by retreating, the party assailed must retreat rather than kill.[3]

The cases which support the former opinion are based upon one of two contradictory grounds: 1, that they are following English authority; 2, that they are opposed to English authority, but the conditions of the new country require a different rule. The first ground is that alleged in the leading case of Erwin *v.* State.[4] The court explained elaborately Foster's distinction between excusable and justifiable homicide, and based its decision upon that distinction. On the other hand, in Runyan *v.* State,[5] the other leading case upon this subject, it was argued that

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[1] Dig. Cr. L. 160 *n.*

[2] La Rue *v.* S., 64 Ark. 144, 41 S. W. Rep. 53 (but see Elder *v.* S., 69 Ark. 648, 65 S. W. Rep. 938); P. *v.* Lewis, 117 Cal. 186, 48 Pac. Rep. 1088 (*semble*); Ritchey *v.* P., 23 Col. 314, 47 Pac. Rep. 272 (statutory); Ragland *v.* S., 111 Ga. 211, 36 S. E. Rep. 82; Page *v.* S., 141 Ind. 236, 40 N. E. Rep. 745; S. *v.* Hatch, 57 Kan. 420, 46 Pac. Rep. 708; Holloway *v.* C., 11 Bush (Ky.) 344; McClurg *v.* C., 17 Ky. L. Rep. 1339, 36 S. W. Rep. 14; McCall *v.* S. (Miss.), 29 So. Rep. 1003; S. *v.* Bartlett (Mo.), 71 S. W. Rep. 148; Willis *v.* S., 43 Neb. 102, 61 N. W. Rep. 254; S. *v.* Kennedy, 7 Nev. 374; Erwin *v.* S., 29 Oh. St. 186; Hays *v.* T. (Okl.), 52 Pac. Rep. 950; Nalley *v.* S., 30 Tex. App. 456, 17 S. W. Rep. 1084 (statutory); Stoneham *v.* C., 86 Va. 523, 10 S. E. Rep. 238.

[3] Allen *v.* U. S., 164 U. S. 492; U. S. *v.* King, 34 Fed. Rep. 302; Henson *v.* S., 120 Ala. 316, 25 So. Rep. 23; S. *v.* Brown (Del.), 53 Atl. Rep. 354; U. S. *v.* Herbert, 2 Hayw. & H. (D. C.) 210, Fed. Cas. 15354*a*; Davison *v.* P., 90 Ill. 221; S. *v.* Donnelly, 69 Ia. 705, 27 N. W. Rep. 369; Pond *v.* P., 8 Mich. 150 (*semble*); S. *v.* Rheams, 34 Minn. 18, 24 N. W. Rep. 302; P. *v.* Constantino, 153 N. Y. 24, 47 N. E. Rep. 37; S. *v.* Gentry, 125 N. C. 733, 34 S. E. Rep. 706; C. *v.* Drum, 58 Pa. St. 9; S. *v.* Summer, 55 S. C. 32, 32 S. E. Rep. 771; S. *v.* Roberts. 63 Vt. 139, 21 Atl. Rep. 424; S. *v.* Zeigler, 40 W. Va. 593, 21 S. E. Rep. 763.

[4] 29 Oh. St. 186.

[5] 57 Ind. 80.

"the ancient doctrine as to the duty of a person assailed to retreat as far as he can before he is justified in repelling force by force has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement, or even to save human life."

While these two decisions, so contradictory in reasoning, are cited together in many cases as the twin harmonious pillars of the brutal doctrine they support,[1] the real reason at the basis of such decisions is that of the Indiana case. In the West and South, where most of these authorities are found, it is abhorrent to the courts to require one who is assailed to seek dishonor in flight. The ideal of these courts is found in the ethics of the duelist, the German officer, and the buccaneer.

"The right to go where one will, without let or hindrance, despite of threats made, necessarily implies the right to stay where one will, without let or hindrance. These remarks are controlled by the thought of a lawful right to be in the particular locality to which he goes or in which he stays. It is true, human life is sacred, but so is human liberty. One is as dear in the eye of the law as the other, and neither is to give way and surrender its legal status in order that the other may exclusively exist, supposing for a moment such an anomaly to be possible. In other words, the wrongful and violent act of one man shall not abolish or even temporarily suspend the lawful and constitutional right of his neighbor. And this idea of the non-necessity of retreating from any locality where one has the right to be is growing in favor, as all doctrines based upon sound reason inevitably will. . . .

"But nothing above asserted is intended to convey the idea that one man, because he is the physical inferior of another, from whatever cause such inferiority may arise, is, because of such inferiority, bound to submit to a public horsewhipping. We hold it a necessary self-defense to resist, resent, and prevent such humiliating indignity, — such a violation of the sacredness of one's person, — and that, if nature has not provided the means for such resistance, art may; in short, a weapon may be used to effect the unavoidable necessity."[2]

As this is the sentiment of so many courts in certain parts of the country, it is fair that it should be answered by another court from the same section.

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[1] Beard *v.* U. S., 158 U. S. 550; P. *v.* Hecker, 109 Cal. 451, 42 Pac. Rep. 307; Willis *v.* S., 43 Neb. 102, 61 N. W. Rep. 254.

[2] S. *v.* Bartlett (Mo.), 71 S. W. Rep. 148, 151.

"No balm or protection is provided for wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly. Such thoughts are trash, as compared with the inestimable right to live." [1]

And Agnew, J., said: [2]

"It is certainly true that every citizen may rightfully traverse the street, or may stand in all proper places, and need not flee from every one who chooses to assail him. Without this freedom our liberties would be worthless. But the law does not apply this right to homicide. The question here does not involve the right of merely ordinary defence, or the right to stand wherever he may rightfully be, but it concerns the right of one man to take the life of another. Ordinary defence and the killing of another evidently stand upon different footing. When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die." [3]

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[1] Charge approved in Springfield *v.* S., 96 Ala. 81, 11 So. Rep. 250.

[2] C. *v.* Drum, 58 Pa. St. 9, 22.

[3] The European law is generally favorable to the right to stand one's ground. Two reasons are given: that a man cannot be constrained to take the risk even of a retreat that seems safe, and that he cannot be obliged to yield his honor and dignity by a retreat. Opinion has not been unanimous. Julius Clarus (Lib. V., Homicidium, § 32) states that the commonly accepted opinion requires retreat, if safe, and he collects numerous authorities to that effect. To the same effect are the strong words of the Tribune Faure in the Conseil d'Etat: "Le citoyen qui repousse un outrage grave, n'est pas mis dans la nécessité d'opposer la force à la force; s'il frappe, s'il blesse, s'il tue, ce n'est que pour venger une injure et punir l'homme qui l'a offensé. Or, le droit de punir ne peut être confié qu'à l'autorité publique, et, en tout cas, il serait contre les règles de laisser l'offensé se constituer juge dans sa propre cause. Les tribunaux lui sont ouverts; c'est là qu'il doit demander la réparation qui lui est due" (quoted 37 Pand. Fr. Rec. 575). In the only reported French case upon this subject which has been found, the court took the same view: Min. Publ. *v.* Prime, Caen, Nov. 29, 1899, Pand. Périod. 1901. 2. 32, Rec. arr. Caen & Rouen, 1899. 1. 200. The prevailing doctrine in France is, however, *contra.* Thus Julius Clarus (*loc. cit.*), after stating the received opinion of his day, expresses his own opinion to the effect that one assailed need not retreat; and the same view is taken of the modern law, after collecting and comparing the authorities, by the authors of the Pandectes Françaises (Pand. Fr. Rec. vol. 37, p. 576).

The German courts also, as one might expect, protect one who when assailed stands his ground and kills. Thus the Reichsgericht, on May 13, 1887 (Entsch. des R. G., Strafsachen, vol. 16, p. 69) said: "Das Gesetz, sowie dasselbe nicht bloss die Person des Angegriffenen, sondern neben dem Vermögen auch dessen Ehre durch das Recht der Selbstverteidigung hat schützen wollen, nicht hat verlangen können, dass als Mittel dem Angriffe zu entgehen, die Flucht auch dann gewählt werde, wenn dieselbe nicht ohne eigenes Opfer an berechtigten Interessen bewirkt werden kann, namentlich also, wenn sich solche nach den Anschauungen des gesellschaftlichen Verkehrslebens unter den gegebenen Umständen als schimpflich oder unehrenhaft darstellen würde."

The Italian law appears to be the same. Thus the Digesto Italiano (*sub voce* Difesa Legittima, no. 140) cites Impallomeni (Completo Trattato 1, 191): "La dignità individuale è anch'essa un diritto personale che non si può essere costretti ad abdicare. . . . Riconosciuto che egli esercita un diritto difendendosi da un' ingiusta

In some cases, as all authorities agree, there is no need of retreat, but the assailed may kill the assailant if it is otherwise necessary to save his own life. Thus if retreat would not (so far as the assailed can see) diminish the danger, he may defend himself on the spot.[1] And if one is assailed in his own dwelling-house, which is his castle, he is not obliged to withdraw therefrom and leave himself in that respect defenseless.[2] Many authorities go further, and allow the assailed to stand his ground when he is attacked in the immediate vicinity of his dwelling-house, in his curtilege,[3] and there is reasonable ground for arguing that a man's right to the protection of his house necessarily extends to the immediate neighborhood of it. In a few jurisdictions this doctrine is carried still further, and one is allowed to stand his ground and kill an assailant on his own premises, though not in the neighborhood of the dwelling-house.[4] This appears to be the present doctrine of the Supreme Court of the United States. In Beard *v.* United States,[5] where the defendant was assailed on his own prem-

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aggressione, sarebbe contradittorio imporgli tali condizioni che ne offendessero la libertà e la dignità."

The Supreme Court of Hungary (April 9, 1889, in a decision reprinted in 31 Rev. Pen. 279) proceeded upon a reasonable distinction. The facts proved showed that a son assailed by his father had killed in self-defense without retreating. The court, taking the usual European view of the question, held however that a son ought to retreat rather than kill his father.

The most ingenuous limitation is that laid down in the Pandectes Belges (vol. 16, p. 802), citing Haus, Droit pénal, no. 626: "Si la fuite était déshonorante comme le serait celle d'un militaire en uniforme, quand même il ne serait pas en service, il faut bien admettre le droit de résister quand des moyens autres que la fuite font défaut. . . . Ils considéraient la fuite comme honteuse pour les *militaires* et les *gentilshommes*."

[1] S. *v.* Peo, 9 Houst. (Del.) 488, 33 Atl. Rep. 257; U. S. *v.* Herbert, 2 Hayw. & H. (D. C.) 210, Fed. Cas. 15354*a*; P. *v.* Macard, 73 Mich. 15, 40 N. W. Rep. 784; Conner *v.* S. 13 So. Rep. 934 (Miss.); C. *v.* Breyesse, 160 Pa. St. 451, 28 Atl. Rep. 824; S. *v.* Roberts, 63 Vt. 139, 21 Atl. Rep. 424 (*semble*); Bird *v.* S., 77 Wis. 276, 45 N. W. Rep. 1126. In Alabama retreat must be attempted unless it would increase the danger. Carter *v.* S., 82 Ala. 13, 2 So. Rep. 766.

[2] Albertz *v.* U. S., 162 U. S. 499; Brinkley *v.* S., 89 Ala. 34, 8 So. Rep. 22; Elder *v.* S., 69 Ark. 648, 65 S. W. Rep. 938; S. *v.* Middleham, 62 Ia. 150, 17 N. W. Rep. 446; Eversole *v.* C., 95 Ky. 623, 26 S. W. Rep. 816; S. *v.* O'Brien, 18 Mont. 1, 43 Pac. Rep. 1091; S. *v.* Harman, 78 N. C. 515; Palmer *v.* S., 9 Wyo. 40, 59 Pac. Rep. 793.

[3] Naugher *v.* S., 105 Ala. 26, 17 So. Rep. 24; Haynes *v.* S., 17 Ga. 465; Wright *v.* C., 8 Ky. L. Rep. 718, 2 S. W. Rep. 909; Smith *v.* C., 16 Ky. L. Rep. 112, 26 S. W. Rep. 583; P. *v.* Kuehn, 93 Mich. 619, 53 N. W. Rep. 721; Fitzgerald *v.* S., 1 Tenn. Cas. 505; S. *v.* Cushing, 12 Wash. 527, 45 Pac. Rep. 145.

[4] Foster *v.* T., 56 Pac. Rep. 738 (Ariz.); Baker *v.* C., 93 Ky. 302, 19 S. W. Rep. 975; S. *v.* Hudspeth, 150 Mo. 12, 51 S. W. Rep. 483 (premises or the public highway); *contra*, Lee *v.* S., 92 Ala. 15, 9 So. Rep. 407.

[5] 158 U. S. 550.

ises, the court held that he was not obliged to retreat; and though in his opinion Mr. Justice Harlan pointed out more than once that the defendant was "on his premises, outside of his dwelling-house," "where he had the right to be," he apparently decided the case on the general principle laid down in Erwin *v.* State and Runyan *v.* State. In a subsequent case, however, the doctrine of the two last cases was repudiated, and Beard *v.* United States was distinguished on the ground that in that case the defendant was assailed "upon his own premises and it was held that the obligation to retreat was no greater than it would have been if he had been assailed in his own house."[1] This is an untenable distinction, for under no circumstances can one claim that mere land is his castle, or defend it as he can defend a dwelling-house.[2]

As to the general principle about which the American authorities are in such conflict, there should be no theoretical doubt. No killing can be justified, upon any ground, which was not necessary to secure the desired and permitted result; and it is not necessary to kill in self-defense when the assailed can defend himself by the peaceful though often distasteful method of withdrawing to a place of safety. The problem is the same now in America as it was three centuries ago in England. It is of course true that to retreat from an assailant with a revolver in his hand is dangerous, and one whose revolver is in his pocket is not to be despised; the hip-pocket ethics of the Southwest are doubtless based upon a deep-felt need. But because retreat is less often safe than in the days of knives and small-swords, it by no means follows that retreat when certainly safe should be less requisite. Because a man cannot safely retreat from a pistol, we may not infer that he need not safely retreat from a pitchfork or a blow of the fist.

The contrary argument based upon the supposed distinction between excusable and justifiable homicide we have seen to be erroneous, and to follow Foster's misunderstanding of the language of Coke. The conclusion of the courts which deny the duty to retreat is, as we have seen, more commonly rested upon two arguments: that no one can be compelled by a wrongdoer to yield his rights, and that no one should be forced by a wrongdoer to the ignominy, dishonor, and disgrace of a cowardly retreat.

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[1] Allen *v.* U. S., 164 U. S. 492, 498.
[2] Wallace *v.* U. S., 162 U. S. 466.

As to the argument of right, the answer of the Pennsylvania court, already quoted, is sufficient. The law does not ordinarily secure the enjoyment of rights; it grants redress for a violation of rights. Sometimes, to be sure, equity by injunction or decree attempts to protect rights rather than to redress wrongs, but this is extraordinary. Still less frequently the law permits one to protect his own rights, but in no case may he do this unless in accordance with the interests of the state. The only property which the law permits him to protect by killing a wrongdoer is his dwelling-house, and that only when its protection is necessary to the safety of his person. To test the proposed doctrine let us suppose that the owner of a large estate erects a rifle range, as he legally may, in the midst of it, and is about to shoot at a target; a trespasser, too strong to be removed by the owner, stands before the target and will not move; it will hardly be contended that the owner can continue his practice through the body of the trespasser. Yet this is the only method by which he may exercise his undoubted right to shoot.

The argument based upon the honor of the assailed is more elusive and more difficult to answer. The language of the Alabama court is, to be sure, logically conclusive; it convinces the intellect, but fails to touch the heart and the imagination, and leaves one of the same opinion still. The feeling at the bottom of the argument is one beyond all law; it is the feeling which is responsible for the duel, for war, for lynching; the feeling which leads a jury to acquit the slayer of his wife's paramour; the feeling which would compel a true man to kill the ravisher of his daughter. We have outlived dueling, and we deprecate war and lynching; but it is only because the advance of civilization and culture has led us to control our feelings by our will. And yet in all these cases sober reflection would lead us to realize that the remedy is really worse than the disease. So it is in the case of killing to avoid a stain on one's honor. A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow-being on his hands. It is undoubtedly distasteful to retreat; but it is ten times more distasteful to kill. The position of the assailed is an unpleasant one. The law cannot help that; it is incapable of protecting him from the painful alternative; but the necessity of undergoing illegal injuries is

one of the penalties of life in society. He does not avoid his predicament by killing.

This reasoning is not true, I admit, in the case of the border-ruffian, who walks about the earth with one hand on his hip-pocket, and shoots each similar gentleman at sight, — he would never regret that he had killed his man. But the argument itself is inapplicable. To talk of dishonor and cowardice in the case of such a cowardly and bullying brute is a bit inopportune.

But, after all, such feelings as I have described are merely the natural uncontrolled impulses of the individual; and it is to control such feelings, both forcibly and by putting an end to the necessity for their exercise, that law itself exists. The duel, war, and lynching show the unnecessary failure of law; so does the doctrine of Runyan *v.* State. If the law is to be carried out it must protect the state against such homicides. The interests of the state alone are to be regarded in justifying crime; and those interests require that one man should live rather than that another should stand his ground in a private conflict.

Joseph H. Beale, Jr.